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No. 97-471

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Petitioner,

v.

BLACKWELL, SANDERS, MATHENY, WEARY & LOMBARDI, L.C., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.L.P. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Dated: November 14, 1997

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COUNTER STATEMENT OF QUESTIONS PRESENTED

Respondent respectfully suggests that the issues framed by petitioner are more accurately stated as follows:

1. Whether the Court of Appeals properly concluded that petitioner's statute-of-limitations arguments are barred by the law-of-the-case doctrine when those arguments were rejected in an interlocutory appeal in 1995 and when this Court denied KPERS's petition for review of that decision in 1996.

2. Whether the Court should grant a petition for a writ of certiorari when, by the petitioner's own admission, the decision in this case will not affect any nonparties or have any precedential impact because the Kansas law on which the 1995 and 1997 decisions of the Court of Appeals are based has now been clarified by the state supreme court.

3. With respect to certain respondents, whether the Court should grant the petition, vacate the decision of the court of appeals, and remand for reconsideration in light of the Kansas Supreme Court statute-of-limitations decision when petitioner's claims against those respondents are still time-barred under the applicable Missouri statute of limitations.

PARTIES TO THE PROCEEDING

The named respondents to this case are: Reimer & Koger Associates, Inc., Ronald Reimer, Kenneth H. Koger, Clifford W. Shinski, Brent Messick, Robert Crew, Sherman Dreiseszun, I.I. Ozar, Frank Sebree, Peat, Marwick, Mitchell & Co., KPMG Peat Marwick, Robert Spence, Thomas S. Morgan, co-executor of the estate of Frank S. Morgan, Marilyn J., co-executor of the estate of Frank S. Morgan, Shook, Hardy & Bacon, through C. Patrick McLarney, substituted for Shook Hardy law firm, and Blackwell Sanders Matheny Weary & Lombardi, L.L.P.

RULE 29.6 STATEMENT

Respondent Blackwell Sanders Matheny Weary & Lombardi, L.L.P. is a Kansas City, Missouri-based law firm, with other offices outside of Missouri, operating as a limited liability partnership under the laws of the State of Missouri. Its member attorneys possess complete ownership of the firm, and the firm possesses no other ownership interests.

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STATEMENT OF THE CASE

Petitioner Kansas Public Employees Retirement System (KPERS) is the retirement plan for employees of the State of Kansas, including all Kansas state-court judges. KPERS claims that it lost a substantial amount of money in the 1980s on direct placement and other venture capital investments. In the 1990s, KPERS began to sue everyone involved with those unsuccessful investments, including the lawyers who prepared the transaction documents at the direction of KPERS's investment advisors. All of the lawsuits were filed in Kansas state courts. This case is the only case that was removed to federal court.

The underlying facts, though not directly relevant to the issues presented in the petition for certiorari, center on KPERS's 1986 investment in Home Savings Association, a federally insured savings and loan. Respondent Blackwell Sanders served as counsel to KPERS's investment advisors, Reimer & Koger Associates, Inc. (R&K), for purposes of the first Home Savings investment transaction from January to May 1986.[1] *KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.*, 114 F.3d 679, 683 (8th Cir. 1997) (*KPERS V*) (Appendix A to KPERS's Petition, p. 1a). Blackwell Sanders prepared documents necessary to consummate the investment transaction but did not represent R&K or KPERS on a continuing basis. In December 1986, after the investment transaction was

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[1] Blackwell Sanders was only involved in the consummation of the initial $15 million investment in Home Savings that closed May 2, 1986. Blackwell Sanders played no role in KPERS's September 1986 investment of an additional $50 million in Home Savings.

completed, articles in the *Kansas City Star* raised questions regarding the wisdom of KPERS's investment in Home Savings and certain conflict of interest issues involving Michael Russell, KPERS's chairman. *Id.* In 1991, Home Savings failed for reasons unrelated to the work of Blackwell Sanders, and KPERS began this lawsuit. *Id.* at 684. Blackwell Sanders, however, was not sued until 1995 – almost nine years after its involvement in the initial Home Savings investment ended. *Id.* at 685.

During the summer of 1996, the District Court granted summary judgment in favor of all of the defendants in this case on the ground that the applicable statutes of limitation had run before KPERS filed its claims. *KPERS v. Reimer & Koger Assocs., Inc.*, Nos. 92-0922 & 95-0819, Order Granting Defendants' Motions for Summary Judgment (W.D. Mo. June 3, 1996) (Appendix D to Petition, p. 27a); *KPERS v. Reimer & Koger Assocs., Inc.*, Nos. 92-0922 & 95-0819, Order Granting Defendants' Motion for Final Judgment Pursuant to Rule 54 and Granting Defendants' Motion for Permanent Injunction (W.D. Mo. July 22, 1996) (Appendix E to Petition, p. 74a). That decision was affirmed by the Eighth Circuit in the decision KPERS now asks this Court to review.

The principal legal issues in this case, however, and the ones that KPERS now raises, were decided over two years ago in an interlocutory appeal in which this Court denied certiorari. The Eighth Circuit held in this earlier appeal that (1) when a case is removed, as this one was, under 12 U.S.C. § 1441a(*l*)(3), the limitations law of the forum – here, Missouri – applies; (2) under Missouri law, KPERS's claims are subject to Missouri's five-year statute of limitations unless "fully barred" by a shorter statute of

limitations in the state where the lawsuit originated; and (3) the applicable Kansas statutes of limitation[2] fully barred KPERS's claims because the special ten-year "KPERS" statute of limitations,[3] while applying "retroactively" to extend the limitations period for accrued but not yet barred claims, did not revive already barred claims. *KPERS v. Reimer & Koger Assocs., Inc.*, 61 F.3d 608, 615 (8th Cir. 1995) (*KPERS III*). This Court denied KPERS's petition for a writ of certiorari in that earlier appeal. *KPERS v. Reimer & Koger Assocs., Inc.*, 116 S. Ct. 915 (1995).

Applying *KPERS III* on remand, the District Court concluded that KPERS's claims were barred by the two and three-year Kansas statutes of limitation and entered summary judgment in favor of all of the defendants. *KPERS v. Reimer & Koger Assocs., Inc.*, Nos. 92-0922 & 95-0819, Order Granting Defendants' Motions for Summary Judgment (W.D. Mo. June 3, 1996). KPERS's latest petition to this Court never challenges the District Court's application of *KPERS III* or its factual findings; rather, KPERS is now challenging the Eighth Circuit's

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[2] K.S.A. §§ 60-512, 513 (three years for statutory claims; two years for tort claims).

[3] Shortly after the defendants had filed their motions to dismiss in state court, the Kansas legislature adopted a ten-year statute of limitations applicable only to civil actions brought by KPERS. Kansas Laws 1992, ch. 321, § 21 (codified as K.S.A. § 60-522). After the defendants had argued that the new statute did not apply to claims already expired, the legislature amended the statute so that it would be "construed and applied retroactively." 1993 Kansas Session Laws ch. 227 (H.B. 2211) (codified as K.S.A. § 60-522(c)).

1995 *KPERS III* decision that the two and three-year statutes of limitation apply to KPERS's claims. KPERS argues that, under Kansas law, no statute of limitations applies to its claims because maintaining KPERS is a governmental rather than a proprietary function of the State of Kansas. In other words, KPERS is reasserting arguments that the Eighth Circuit rejected and this Court declined to consider when it denied KPERS's petition for a writ of certiorari after *KPERS III*.

After the District Court granted summary judgment in favor of all defendants, KPERS appealed,[4] and the Eighth Circuit affirmed.[5] *KPERS V*, 114 F.3d 679 (8th Cir.

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[4] In its opening brief before the Eighth Circuit in the present case, KPERS suggested for the first time that the statute-of-limitations issues be certified to the Kansas Supreme Court for decision. KPERS, however, never filed a motion to certify any questions to the state high court.

[5] KPERS alleges that the Eighth Circuit decided this appeal with "unusual haste," KPERS's Petition at 4, apparently because this case was set for argument in March 1997 after the calendar of arguments for that month had been issued, KPERS's Petition at 9. Although KPERS seems to imply that the setting of argument was motivated by improper considerations, a much more plausible explanation exists. As a matter of sound judicial administration, and in order to conserve judicial resources, related cases are generally assigned to the same panel that decided earlier appeals in the same case. The *KPERS* cases have all been decided by panels consisting of Judges Theodore McMillian (St. Louis), John R. Gibson (Kansas City), and either Pasco M. Bowman (Kansas City) or David R. Hansen (Cedar Rapids, Iowa). The court's annual Kansas City court session was scheduled for March 1997, and Judges McMillian, Bowman, and Gibson were already scheduled to sit in Kansas City that month. Moreover, many of the attorneys involved in this case are located in Kansas City. For the convenience of the court and the

1997). The court of appeals held that KPERS was prohibited by the law-of-the-case doctrine from relitigating the applicability of the two and three-year Kansas statutes of limitation even though the issue of whether KPERS's investment was a governmental rather than a proprietary function was not explicitly addressed in *KPERS III*. *Id.* at 687. The court addressed the merits of KPERS's governmental-function argument only to decide whether reliance on the law-of-the-case doctrine would result in a manifest injustice.[6] The court concluded that no manifest injustice would result from application of the doctrine because KPERS's arguments lacked merit. The court's conclusion was based in part on the Kansas Supreme Court's 1985 decision that " '[m]aintaining KPERS is a

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parties, therefore, the case was scheduled for argument in Kansas City in March 1997.

[6] KPERS states that the Eighth Circuit recognized "that it would be a 'manifest injustice' to" hold that the governmental-capacity issue cannot be relitigated under the law-of-the-case doctrine "if, in fact, KPERS' investment function [sic] were governmental." Petition at 6 n.8. Nothing in the Eighth Circuit's opinion supports this statement. The court of appeals stated that "[w]e are satisfied that the law of the case doctrine prevents KPERS from relitigating the issue of whether these statutes apply to its claims." *KPERS V*, 114 F.3d at 687. At the time of the decision in *KPERS III* – almost two years before the Kansas Supreme Court's decision in *KPERS v. Reimer & Koger* – the Eighth Circuit implicitly concluded that the Kansas Supreme Court would adhere to its holding in *In re Midland Industries*, 237 Kan. 867, 703 P.2d 840 (1985), that maintaining KPERS is a proprietary function of the state. That conclusion became the law of the case in 1995. Nothing in the *KPERS V* opinion suggests that the court would have changed its decision had the state supreme court overruled *Midland Industries* after *KPERS III* but before *KPERS V*.

proprietary function of the state.' " *Id.* (quoting *In re Midland Indus.*, 237 Kan. 867, 703 P.2d 840, 843 (1985)) (emphasis added). According to the court, the "clear holdings" of *Midland Industries* "compel rejection of KPERS's argument" that it is not subject to any statute of limitations because its investments were made in a governmental capacity. *KPERS V*, 114 F.3d at 688.

The Eighth Circuit issued its opinion in *KPERS V* on May 13, 1997, and denied KPERS's Petition for Rehearing and Suggestion for Rehearing En Banc on June 12, 1997. KPERS filed a second rehearing petition after the mandate issued, and the Eighth Circuit denied that petition as well.

Some of the same statute-of-limitations issues decided by the Eighth Circuit also arose in other KPERS cases pending in Kansas state courts, and a Kansas state trial court held that no statute of limitations applied to KPERS's claims because it was acting in a governmental capacity when it invested funds. *See KPERS v. Reimer & Koger Assocs., Inc.*, 262 Kan. 635, 941 P.2d 1321, 1325-26 (1997). The defendants in five of the state-court cases sought interlocutory review of the trial court's decision. On June 27, 1997 – after the Eighth Circuit had already denied KPERS's petition for rehearing – the Kansas Supreme Court affirmed the trial court, holding that KPERS acts in a governmental capacity when it invests its funds. *Id.* at 1341-43. The court characterized its earlier contrary statement in *Midland Industries* as "pure dicta," *id.* at 1340, and stated that the Eighth Circuit's decision "regarding governmental-proprietary functions" was incorrect, *id.* at 1343. But the court also noted that the

Eighth Circuit had concluded that KPERS's governmental-function argument was barred under the law-of-the-case doctrine. *Id.* at 1338. Moreover, the Kansas court did not address the impact of the Missouri borrowing statute.

REPLY TO PETITIONER'S STATEMENT OF THE CASE

KPERS's statement of the case mischaracterizes the removal procedure used in this case, even though that procedure is irrelevant to the issues raised in KPERS's petition. Despite KPERS's suggestions to the contrary, this case was properly removed to federal court in Missouri. Although KPERS continues to complain that the respondents are attempting to avoid Kansas courts, the respondents and the Resolution Trust Corporation (RTC) have in fact exercised federal rights granted by Congress.

KPERS filed the petition that began this lawsuit on June 5, 1991, alleging that it lost $65 million in its 1986 investment in Home Savings Association, a Missouri-based savings and loan. Several defendants moved to dismiss KPERS's claims on the ground that the applicable statutes of limitation had run before KPERS filed its petition. The RTC, as receiver for Home Savings, then moved for leave to intervene in order to remove the case to federal court, but the state trial court[7] failed to rule on

[7] The state trial judge, the Honorable Franklin R. Theis, was subsequently removed from all of the KPERS cases because he "considered matters upon which no evidence had been presented" and made "derogatory" statements toward

that motion for over five months. *KPERS v. Reimer & Koger Assocs., Inc.*, 4 F.3d 614, 616 (8th Cir. 1993) (*KPERS I*), *cert. denied*, 511 U.S. 1126 (1994). The state trial court nonetheless denied the motions to dismiss and held that no statute of limitations applied to KPERS's claims because KPERS was acting in a governmental capacity. *KPERS v. Reimer & Koger Assocs., Inc.*, No. 91-CV-786, Mem. Op. at 30-31 (Dist. Ct. Shawnee County, Kansas Aug. 21, 1992).

Several defendants then filed third-party petitions against the RTC, alleging that part of KPERS's alleged loss resulted from the RTC's negligent mismanagement of Home Savings and seeking indemnification from the RTC under 12 C.F.R. § 545.121. Invoking special authority granted to the RTC by Congress, the RTC removed the case to federal district court in Missouri under 12 U.S.C. § 1441a(*l*)(3)(A). While KPERS describes this "charitably . . . as a creative combination of third-party practice and a special removal statute," KPERS's Petition at 4, the Eighth Circuit concluded that the removal was proper and rejected KPERS's attempt to circumvent federal law.[8]

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defendants in a written order indicating "a personal bias against the defendants or the positions taken by them in this litigation." *KPERS v. Cohen, Brame & Smith, P.C.*, No. 92-CV-805, Mem. Decision at 9 (Dist. Ct. Shawnee County, Kansas Aug. 28, 1996) (Appendix to this Brief).

[8] After the RTC was brought into this lawsuit, KPERS sought and received an *ex parte* order from the state court that purported to sever the third-party claims against the RTC from the principal case. The sole basis for this order was to prevent the RTC from removing the entire case to federal court. The Eighth Circuit held that the severance order was void because it violated the Supremacy Clause. *KPERS I*, 4 F.3d at 616-17, 619.

KPERS I, 4 F.3d at 619-20. No issue regarding the removal of this case is before this Court at this time.

To the extent that any additional facts are relevant to the Court's consideration of this petition, respondent Blackwell Sanders Matheny Weary & Lombardi, L.C. incorporates by reference the factual statements in the opinions of the Eighth Circuit in *KPERS III* and *KPERS V*.

REASONS FOR DENYING THE WRIT

I. This Court Should Not Grant a Petition for a Writ of Certiorari When, by the Petitioner's Own Admission, the Decision in this Case Will Not Affect Any Nonparties or Have Any Precedential Impact Because the Kansas Law on Which the 1995 and 1997 Decisions of the Court of Appeals Are Based Has Now Been Clarified by the State Supreme Court.

This case does not present any issues worthy of certiorari. Petitioner admits that future litigants need no guidance on the narrow question of how Kansas courts interpret the special KPERS limitation statute because the state supreme court has now decided the issue. Petition at 2. The decision in this case will not affect anyone but the parties, and it will not have any precedential impact. There is no issue of federal constitutional law to decide. There is no split in authority between the circuits. And the vague federalism concerns advanced by petitioner are already fully addressed by the Court's well-developed decisions on federal-state comity and abstention.

To justify its petition for a writ of certiorari, KPERS offers only an ill-conceived argument in favor of a "proposed rule" of "cooperative judicial federalism." Petition at 12-13. KPERS states the rule as follows:

> Where a State is litigating its own claims under its own law in federal court, and where the litigation turns on a state-law issue of first impression, the federal court has an obligation to defer to the highest court of that State on that issue – perhaps in all cases, but *at least* where the federal court is informed that the issue is currently pending before the State's highest court. [Petition at 12 (emphasis in original).]

Under this rule, a federal court would be *required* to either *sua sponte* certify a controlling question of state law to that state's highest court or "simply wait" when there is "contemporaneous consideration of the issue by the highest court of that state." *Id.*

This Court need not grant certiorari in this case because federal law regarding abstention and certification is well developed and in no need of clarification. Moreover, the proposed rule would disrupt much of that well-developed law by abrogating the historic and considerable discretion federal courts have to certify issues of state law or to abstain from exercising their lawful jurisdiction. *Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1721-22 (1996) (abstention); *Lehman Bros. v. Schein*, 416 U.S. 386 (1974) (certification). *Requiring* a federal court to "simply wait" would prejudice the other parties to the lawsuit, who are entitled to "the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. For example, by the time the Kansas Supreme Court

set aside its prior conclusion that maintaining KPERS is a proprietary function, some of the respondents had been litigating the applicable statute of limitations for more than *five years*.

Even if it were necessary to clarify the law in the areas of abstention or certification – and it is not – KPERS's proposed rule of "cooperative judicial federalism" would not help KPERS in this case. Under the proposed rule, the obligation to defer to a state's highest court arises only "where the litigation turns on a state-law issue of first impression." Petition at 2. The state-law issue decided by the Kansas Supreme Court was whether KPERS's investment activities were proprietary or governmental. While the state supreme court characterized some of its earlier decisions as dicta, the fact remains that the court had stated that "[m]aintaining KPERS is a proprietary function of the state." *Midland Indus.*, 703 P.2d at 843. While the Kansas Supreme Court is entitled to change its mind, it is misleading at best for KPERS to characterize the issue decided in the 1997 *KPERS* opinion as an issue of "first impression."[9]

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[9] KPERS's reliance on *Kaiser Steel Corporation v. W.S. Ranch Company*, 391 U.S. 593 (1968), and its reference to the Judicial Conference's endorsement of "procedures for submission of novel or difficult state law questions to the state courts," Petition at 16-17, are likewise irrelevant to this case. In 1995, when the Eighth Circuit decided *KPERS III*, the Kansas Supreme Court was on record as describing KPERS's functions as proprietary, *Midland Industries*, 703 P.2d at 843, and no pending case raised the issue. Thus the issue was not novel, difficult, or pending before the state supreme court when the Eighth Circuit decided it.

The proposed rule also fails to justify reversal of the Eighth Circuit's opinion because there was no "contemporaneous consideration of the issue" by the Kansas Supreme Court. As explained above, the Court of Appeals decided which statute of limitations applies to KPERS's claims in *KPERS III* – nearly two years before the issue was presented to the state supreme court. The court's subsequent application of the law-of-the-case doctrine, achieving the important goals of finality and conservation of judicial resources, was predictable and entirely proper.

In sum, none of the traditional grounds for granting a petition for a writ of certiorari are present in this case. At most, the Eighth Circuit incorrectly predicted the Kansas Supreme Court's change of course on the "governmental" versus "proprietary" distinction. But the Kansas Supreme Court's recent decision cannot have a dispositive impact on many of the summary judgments granted by the District Court, including the one in Blackwell Sanders' favor. Moreover, KPERS waived this issue by failing to appeal it in 1995 when it had the chance. Granting KPERS's petition for a writ of certiorari cannot be warranted by concerns for "cooperative judicial federalism" that are not even present in this case.

II. The Court Should Not Grant Certiorari Simply to Vacate and Remand Because the Court of Appeals Properly Concluded that Petitioner's Statute-of-Limitations Arguments are Barred by the Law-of-the-Case Doctrine Where Those Same Arguments Were Rejected in an Interlocutory Appeal in 1995, and This Court Denied Review of That Decision in 1996.

"[W]hen an issue is once litigated and decided, that should be the end of the matter." *United States v. United States Smelting, Refining & Mining Co.*, 339 U.S. 186, 198 (1950). The Court of Appeals decided on July 27, 1995 that KPERS's claims in this case are subject to the two and three-year Kansas statutes of limitation for tort and statutory claims. *KPERS III*, 61 F.3d at 615. Nearly two years after *KPERS III*, with no intervening change in state law, the Court of Appeals adhered to its statute-of-limitations decision in *KPERS III* as the law of the case despite KPERS's new argument that it was not subject to *any* statute of limitations under Kansas law. *KPERS V*, 114 F.3d at 687. Under the law-of-the-case doctrine, the Eighth Circuit's decision in *KPERS V* was indisputably correct when it was rendered, and this Court should not grant KPERS's petition for review. By granting the petition, this Court would disturb the same 1995 ruling that this Court has already declined to review.

A. The Court of Appeals Properly Applied the Law-of-the-Case Doctrine

The law-of-the-case doctrine "promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.' " *Christianson v.*

Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988) (quoting 1B Moore et al., Moore's Federal Practice, p. 118 (1984)). Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation. *Messinger v. Anderson*, 225 U.S. 436, 444 (1912).

KPERS argues that this court should review the Eighth Circuit's decision because the Kansas Supreme Court's contrary decision came so soon after *KPERS V* was decided. But the issue so recently decided by the Kansas Supreme Court was first decided by the Eighth Circuit in 1995. KPERS asked this Court to review the *KPERS III* decision, but its petition was denied. *KPERS v. Reimer & Koger Assocs., Inc.*, 116 S. Ct. 915 (1996). In *KPERS III*, the Eighth Circuit held that KPERS's claims are subject to the Kansas statutes of limitation for tort and statutory claims rather than the ten-year KPERS statute of limitations. 61 F.3d at 615. In *KPERS V*, KPERS suggested that its claims were not subject to any statute of limitations at all.[10] 114 F.3d at 687. The Eighth Circuit simply and properly adhered to its *KPERS III* decision as the law of the case and concluded that KPERS's claims were still subject to the two and three-year Kansas statutes of limitation. *Id.*

KPERS contends that the law-of-the-case doctrine was not applicable to its new argument because it "elect[ed] not to seek interlocutory review with respect to

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[10] KPERS's new argument was based on its claim that its investment activities were governmental functions. While KPERS had made the governmental-function argument in the District Court before the *KPERS III* appeal, it did not raise the issue with the Court of Appeals in *KPERS III*.

the district court's ruling that KPERS' investment function is proprietary," thus preserving the right to argue on appeal after final judgment that its investment function was governmental and therefore not subject to any statute of limitations. Petition at 6, n.8. This argument, however, borders on frivolous. Courts do not decide arguments; they decide issues. Litigation of arguments that were not advanced on appeal are barred by the law-of-the-case doctrine if they could have been presented in the earlier appeal. When an appellate court decides that evidence is inadmissible, for example, the proponent of the evidence is not permitted to introduce the evidence under an alternative theory on remand. *United States v. Duchi*, 944 F.2d 391, 392-93 (8th Cir. 1991) (*cited in* Wright et al., 18 Federal Practice & Procedure § 4478 at p. 703 (Supp. 1997)). Similarly, the *issue* in *KPERS III* was whether the two and three-year Kansas statutes of limitation apply to KPERS's claims. KPERS should have raised any arguments against applying those statutes in its *KPERS III* briefs. The Eighth Circuit thus properly rejected KPERS's attempt in *KPERS V* to raise the governmental-function argument because KPERS failed to raise it in *KPERS III*.

B. No Manifest Injustice Results from Applying the Law-of-the-Case Doctrine

While "it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice," *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983), nothing before the Eighth Circuit in *KPERS V* indicated that *KPERS III* was wrongly decided or that adherence to *KPERS III* would result in

any injustice. The only "manifest injustice" that exists in this case is the injustice of requiring the respondents to spend years litigating time-barred claims.

The Eighth Circuit's *KPERS III* decision on the applicable statute of limitations was not clearly erroneous when the court decided *KPERS V*, and thus the manifest-injustice exception to the law-of-the-case doctrine is inapplicable in this case. Far from being clearly erroneous, the *KPERS III* decision was entirely consistent with Kansas law as established by the Kansas Supreme Court when *KPERS V* was released.

KPERS's first argument against the applicability of the two and three-year statutes of limitation in *KPERS V* was that its investment activities were governmental rather than proprietary. But the Kansas Supreme Court had concluded that "[m]aintaining KPERS is a proprietary function of the state," *In re Midland Indus.*, 237 Kan. 867, 703 P.2d 840, 843 (1985), and that KPERS "should be held to the same responsibilities and liabilities" as a private business when it engages in activities ordinarily conducted in the private sector, *KPERS V*, 114 F.3d at 687 (citing *Shapiro v. KPERS*, 216 Kan. 353, 532 P.2d 1081, 1083-84 (1975)). In these circumstances, it is entirely reasonable to conclude – as did the Eighth Circuit – that KPERS engaged in a proprietary function when it invested its money in Home Savings.

Second, KPERS argued that the Missouri borrowing statute, Mo. Rev. Stat. § 516.190, does not apply to KPERS. According to KPERS, (1) statutes of limitation did not apply to actions by the state under the common law, (2) Missouri has abrogated the common law rule but only

with respect to lawsuits brought by the state of Missouri, and thus (3) Missouri statutes of limitation cannot run against KPERS because it is an instrumentality of the state of Kansas. The fundamental flaw in this argument is that the state of Kansas is not sovereign in Missouri, and thus the common law maxim *nullum tempus occurrit regi* never exempted Kansas from the running of Missouri statutes of limitation in the first place. The maxim means that "neither laches nor statutes of limitations will bar *the* sovereign." *Block v. North Dakota ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273, 294 (1983) (O'Connor, J., dissenting) (emphasis added) (citing W. Holdsworth, 10 A History of English Law 354 (1938); D. Gibbons, A Treatise on the Law of Limitation and Prescription 62 (1835)). Kansas is not the sovereign in Missouri, and thus the maxim would not exempt it from the running of a Missouri statute of limitations in Missouri courts. *See, e.g., Pennhurst State Sch. v. Estate of Goodhartz*, 42 N.J. 266, 273, 200 A.2d 112, 116 (1964) ("When a foreign state sues in the courts of our State it lays aside its sovereignty and is to be dealt with as a private suitor."); *Michigan v. First Nat'l Bank of Arizona*, 17 Ariz. App. 45, 48, 495 P.2d 485, 489 (1972) ("once a state . . . seeks redress in the courts of a sister state, its mantle of sovereignty drops at its borders, and it enters the courts of another state clothed only in the common garb of an ordinary person"); *cf. Guaranty Trust Co. v. United States*, 304 U.S. 126, 133-34 (1938) ("limitation statutes of the forum run against a foreign government seeking a remedy afforded by the forum, as they run against private litigants").

Thus the *KPERS III* decision was not clearly erroneous but entirely correct, and the law-of-the-case doctrine barred KPERS's attempt to relitigate the statute-of-limitations issue in *KPERS V*.

III. With Respect to Blackwell Sanders and Several Other Respondents, This Court Should Not Grant the Petition, Vacate the Decision of the Court of Appeals, and Remand for Reconsideration in Light of the Kansas Supreme Court Decision Because Petitioner's Claims Against Them are Still Time-Barred Under the Applicable Missouri Statute of Limitations.

Even if the Kansas Supreme Court's 1997 decision on the governmental versus proprietary distinction were to be retroactively applied in this case, it would not change the outcome as to Blackwell Sanders and similarly situated defendants. This is a further reason to decline petitioner's invitation to grant certiorari, vacate and remand.

In *KPERS III*, the Court of Appeals concluded that (1) the limitations law of the forum – Missouri – governs this case, and (2) KPERS's claims are subject to a five-year statute of limitations, Mo. Rev. Stat § 516.120, unless those claims are "fully barred" by a statute in the state in which the cause of action arose – Kansas, *id.* § 516.190. *KPERS III*, 61 F.3d at 614. KPERS's Petition does not challenge the Eighth Circuit's decision regarding the applicability of the Missouri five-year statute of limitations or the District Court's finding that KPERS's claims against the respondents accrued on December 23, 1986. Thus any party KPERS failed to sue by December 23, 1991, is entitled to summary judgment even after the

Kansas Supreme Court's decision in *KPERS v. Reimer & Koger Associates, Inc.*, 262 Kan. 635, 941 P.2d 1321 (1997).[11]

With respect to KPERS's claims against Blackwell Sanders, the Kansas Supreme Court's decision does not change the result in this case: Blackwell Sanders is still entitled to summary judgment. The District Court found – and KPERS has not challenged the finding – that (1) the statute of limitations on KPERS's claims against Reimer & Koger Associates, Inc. began to run no later than December 23, 1986, (2) the statute of limitations on KPERS's claims against Blackwell Sanders began to run at the same time as the limitations period began for KPERS's claims against Reimer & Koger, and (3) KPERS did not bring its claims against Blackwell Sanders until January 6, 1995 – more than eight years after the limitations period began to run. *KPERS v. Reimer & Koger Assocs., Inc.*, Nos. 92-0922 & 95-0819, Order Granting Defendants' Motions for Summary Judgment at 51, 69-70 (W.D. Mo. June 3, 1996).

The applicability of the Missouri five-year statute of limitations is not addressed in the Kansas Supreme Court

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[11] KPERS inexplicably maintains that all of these issues would be subject to reconsideration if this Court remands the case for reconsideration in light of the Kansas Supreme Court decision. Its characterization of the Eighth Circuit's *KPERS III* rulings as "hypothetical," Petition at 21 n.27, is disingenuous. The issues were properly before the court, and KPERS did not then and has not now sought review of those decisions. KPERS should not be allowed to relitigate those issues. If this Court does remand the case, its instructions should clearly limit the scope of the remand to the issues presented in this petition for a writ of certiorari.

decision nor is it raised by KPERS's present certiorari petition. If this Court accepts KPERS's invitation to grant certiorari, vacate the opinion of the Court of Appeals, and remand the case for reconsideration, the District Court will be obligated by the law-of-the-case doctrine to enter summary judgment in favor of Blackwell Sanders and others on the basis of the five-year statute of limitations. Considering basic principles of fairness and justice, as well as the fact that KPERS has kept Blackwell Sanders in court for nearly three years on clearly time-barred claims, the case against Blackwell Sanders and similarly situated respondents should not be reopened. If the Court is inclined to remand this case, it should do so with clear instructions to again enter summary judgment in favor of Blackwell Sanders and similarly situated defendants because the Kansas Supreme Court decision does not affect the validity of the summary judgments entered in their favor.

CONCLUSION

For the reasons stated, KPERS's petition for a writ of certiorari should be denied. Alternatively, if this Court grants certiorari to allow the Eighth Circuit to reconsider its *KPERS III* opinion in light of the Kansas Supreme Court decision, it should do so only with respect to those respondents whose statute-of-limitations defenses are affected by the Kansas decision.

Respectfully submitted,

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Dated: November 14, 1997

APPENDIX

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, Plaintiff, vs. COHEN, BRAME & SMITH, Professional Corporation, ROGER C. COHEN, REIMER & KOGER ASSOCIATES, INC., KENNETH KOGER, EDWARD B. HART, BRENT MESSICK, and GAGE & TURNER, Defendants.	Case No. 92-CV-805
KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, A Corporate Instrumentality of the State of Kansas, Plaintiff, vs. CALLAN ASSOCIATES, INC., A California Corporation; RONALD D. PEYTON, an individual, REIMER & KOGER ASSOCIATES, INC., a Kansas Corporation; and KENNETH H. KOGER, an individual, Defendants.	Case No. 93-CV-375

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, a Corporate Instrumentality of the State of Kansas, Plaintiff, vs. MICHAEL K. RUSSELL, et al., Defendants.	Case No. 93-CV-389
KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, a Corporate Instrumentality of the State of Kansas, Plaintiff, vs. REIMER & KOGER ASSOCIATES, INC., a Kansas corporation; KENNETH H. KOGER, an individual; and BRENT A. MESSICK, an individual; Defendants.	Case No. 93-CV-588 K.S.A. Chapter 60
KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, a Corporate Instrumentality of the State of Kansas, Plaintiff, vs.	Case No. 93-CV-787

NORMAN ALLEN, REIMER & KOGER ASSOCIATES, INC., CHRISTOPHER DIEBEL, KENNETH H. KOGER, and LINDE THOMSON LANGWORTHY KOHN & VAN DYKE, P.C.,

Defendants.

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, a Corporate Instrumentality of the State of Kansas,

Plaintiff,

vs.

RICHARD BYRD, et al.,

Defendants.

Case No. 92-CV-923

MEMORANDUM DECISION

All of the captioned actions are brought by the Kansas Public Employees Retirement System (KPERS) against the respective defendants for the recovery of money. All of the cases were originally assigned to the Honorable Franklin R. Theis, Judge of the Seventh Division of this Court. Counsel for these respective defendants have now filed Motions for Change of Judge, together with Affidavits in support thereof which allege in substance that counsel have cause to believe and do believe that on account of the personal bias, prejudice, or interests of Judge Theis that the defendants cannot obtain a fair and impartial trial in these actions. These Affidavits have

been referred to the undersigned by the Administrative Judge for a decision in accordance with K.S.A. 20-311d. These Affidavits, while not entirely identical, concern essentially the same subject matter and, for the sake of brevity, will be discussed together. The Affidavits allege in substance:

"The first lawsuit in this series which was filed on June 5, 1991, entitled *KPERS v. Reimer & Koger Associates, Inc., et al.*, focused primarily upon KPERS' investment in Home Savings Association, a Kansas City based savings and loan. That suit was originally filed by KPERS in Shawnee County District Court and assigned to Judge Franklin R. Theis.

"After the commencement of the Home Savings suit, several additional defendants were added, including former directors and owners of Home Savings, commonly referred to as the Morgan defendants.

"Shortly thereafter, the Resolution Trust Corporation ("RTC") moved to intervene in the Home Savings action to ensure that the claims being asserted by KPERS against the Morgan defendants were not derivative claims which rightly belonged to the RTC as receiver of Home Savings. The RTC candidly disclosed repeatedly that if permitted to intervene it would remove the Home Savings action to federal court for the purpose of having its derivative claims dismissed.

"Despite the presentation of oral arguments, Judge Theis refused to rule upon the motion to intervene for a period exceeding five months.

"On October 2, 1992, the Morgan defendants filed a third party petition against the RTC seeking statutory indemnification and asserting claims of mismanagement against the RTC as receiver for Home Savings.

"Knowing the RTC's intention to remove the case to federal court once it became a party, KPERS filed a motion to sever the third party claim from the main action. The motion to sever was filed with Judge Theis in person late in the day on October 8, 1992. KPERS' counsel participated in an ex parte emergency hearing with Judge Theis after 5:00 p.m. KPERS' counsel later testified that absolutely no effort was made to contact any defense counsel to give them notice of the hearing or to seek their attendance, in person or by phone.

"Judge Theis did in fact grant KPERS' request for severance on the emergency grounds that should he not do so he would lose jurisdiction of the action when the RTC removed the case to federal court. . . .

"Five days later, the RTC removed the entire Home Savings case, including both the original action and the third party action, to the United States District Court for the Western District of Missouri, Western Division. The RTC took the position that the reported severance was unconstitutional and therefore null and void.

"The United States District Court judge assigned to the Home Savings case in Missouri, the Honorable D. Brook Bartlett, denied KPERS' request for remand, holding that the ex parte severance was null and void because it was done for the sole purpose of defeating federal court jurisdiction and thus violated the Supremacy Clause of the United States Constitution."

The comments of Judge Bartlett are included within the Affidavits.

Judge Bartlett's ruling was later upheld by the United States Court of Appeals for the Eighth Circuit.

The Affidavits next allege that in late 1995, a series of Motions were filed by KPERS and/or various defendants which sought summary judgment and/or judgment on the pleadings. By stipulation of the parties, these Motions all requested Judge Theis to rule upon pure legal issues, without reference to any underlying facts. The legal issues to be decided were:

(A) whether KPERS was subject to any statute of limitations because KPERS argued its claims arose from the performance of a governmental function;

(B) whether KPERS is subject to any statute of limitation because KPERS argued its claims were within the K.S.A. 60-521(2) exception applicable to claims asserted against former officers and employees of state agencies;

(C) if KPERS' claims were subject to a statute of limitations period, whether the special 10-year statute of limitations created for KPERS in K.S.A. 60-522 is applicable; and

(D) if KPERS' claims were subject to K.S.A. 60-522 was such specially created statute constitutional.

Appended to the Affidavits of counsel are the agreed Order of December 19, 1995 which established a briefing schedule concerning these Motions and Judge Theis' Memorandum Opinion and Entry of Judgment dated

April 3, 1996, which decided all of the Motions in favor of KPERS.

The respective Affidavits of counsel next assert that in Judge Theis' Opinion of April 3, 1996, he made numerous remarks which were critical of the defendants or their counsel, which were intemperate and injudicious and which reflect bias, prejudice or hostility toward the defendants. These remarks are set out at length in the respective Affidavits.

The Affidavits next allege that in his opinion of April 3, 1996, Judge Theis made numerous factual findings concerning these cases when no evidence had been presented and there was no record from which these findings could have been derived. The Affidavits set forth these respective findings with particularity and are referenced to the Opinion of April 3, 1996.

In *Holme v. Woleslagel*, 208 Kan. 385, 493 P.2d 541 (1972), the Supreme Court discussed at length the procedure to be followed by district courts when an Affidavit of Prejudice is filed against a trial judge. The Court also discussed the scope of review to be applied to the Affidavit of Prejudice. The Court concluded that the allegations of the Affidavit must be taken as true and the Affidavit must contain facts and reasons which give support for the belief that on account of the bias or prejudice of the judge, the affiant cannot obtain a fair trial. Previous adverse rulings, although numerous and erroneous, where they are subject to review, are not ordinarily alone sufficient to show such bias or prejudice as would disqualify the district judge. Bias or prejudice of the judge

toward an attorney may be a ground for statutory disqualification. In the later decision of *State v. Clothier*, 20 Kan. App. 2d 994, 894 P.2d 257 (1995), the Court of Appeals restated the pertinent rules in the Syllabus as follows:

> "JUDGES – Motion to Change Judge – Affidavit in Support of Motion – Review of Affidavit. In reviewing an affidavit filed pursuant to K.S.A. 20-311d, the reviewing judge passes only on the legal sufficiency of the document, not on the truth of the facts alleged. All facts set out in the affidavit are presumed to be true.
>
> "SAME – Motion to Change Judge – Affidavit in Support of Motion – Test for Determining Impartiality of Judge. The test for impartiality of a judge is what a reasonable person with knowledge of all the circumstances would believe based on the facts set out in the affidavit.
>
> "SAME – Motion to Change Judge – Affidavit in Support of Motion – Review of Affidavit – Duty of Reviewing Judge. The reviewing judge may consider information in addition to the affidavit, but only for the limited purpose of determining the affidavit's legal sufficiency. The reviewing judge must make a record of information considered which is not contained in the affidavit."

See also State v. Griffen, 241 Kan. 68, 734 P.2d 1089 (1987). At page 72, the Court states the determination to be made as follows:

> "Whether the charge of impartiality is grounded on facts that would create reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself, or even, necessarily in the mind of the litigant filing the motion, but rather

in the mind of a reasonable person with knowledge of all the circumstances."

In endeavoring to apply the above stated rules to the case at bar, only the respective Affidavits of counsel, together with the agreed Order of December 19, 1995 and Judge Theis' Memorandum Opinion and Entry of Judgment of April 6, 1996, which are appended to the Affidavits and incorporated therein have been considered.

While the allegations concerning Judge Theis' attempted severance of several defendants from what is referred to as the Home Savings case prior to its removal to the Federal Court do not pertain directly to these defendants in the present cases, these facts speak for themselves and are relevant to a consideration of whether, when viewed with all the allegations contained in the subject affidavits, Judge Theis has displayed a partiality toward KPERS and/or has formed preconceived opinions concerning the positions taken by these moving defendants in the companion litigation.

To detail and discuss each of the statements made by Judge Theis in his Opinion of April 6, 1996, of which counsel complain in their Affidavits would serve only to unnecessarily prolong this opinion. It suffices to say that some of the statements, standing alone, are defensible and are not necessarily indicative of a bias upon the part of the judge. However, when viewed in their entirety, these gratuitous statements indicate that the judge considered matters upon which no evidence had been presented and which were not included within a discovery record. Viewed as a whole, these statements are derogatory toward the defendants and may be said to indicate a

personal bias against the defendants or the positions taken by them in this litigation.

Considering all the facts in the respective Affidavits to be true, it appears that they would create reasonable doubt concerning the judge's impartiality in these cases in the mind of a reasonable person with knowledge of all the circumstances.

For the foregoing reasons, the respective Motions for Change of Judge in the above entitled actions are sustained. The Administrative Judge is requested to assign these cases to another judge of this district.

Dated: 28th day of August, 1996.

/s/ _____
FRED S. JACKSON
DISTRICT JUDGE